

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:
of	:
AMHERST CABLEVISION, INC.	:
for Redetermination of a Deficiency or for	:
Refund of Corporation Tax under Article 9 of	:
the Tax Law for the Year 1986.	:

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In the Matter of the Petition	:
of	:
COMAX TELECOM CORPORATION	:
DETERMINATION	:
for Redetermination of a Deficiency or for	:
Refund of Corporation Tax under Article 9 of	:
the Tax Law for the Year 1986.	:

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In the Matter of the Petition	:
of	:
KEN-TON CABLEVISION, INC.	:
for Redetermination of a Deficiency or for	:
Refund of Corporation Tax under Article 9 of	:
the Tax Law for the Year 1986.	:

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Petitioners, Amherst Cablevision, Inc., Comax Telecom Corporation and Ken-Ton Cablevision, Inc., 3000 One American Center, Austin, Texas 78701, filed petitions for redetermination of deficiencies or for refund of corporation tax under Article 9 of the Tax Law for the year 1986 (File Nos. 806105, 806106 and 806107).

A consolidated hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on September 13, 1990 at 10:00 A.M. Petitioners appeared by Moot & Sprague (Arnold N. Zelman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq.

(Deborah J. Dwyer, Esq., of counsel).

### ISSUE

Whether certain letters dated December 29, 1989 constitute an assertion by the Division of Taxation of greater deficiencies following the filing of petitions pursuant to Tax Law § 1089(e) and/or whether the Division should be directed to file amended answers setting forth the basis of its position with respect to such greater deficiencies and the facts to be proven by the Division in order to sustain such greater deficiencies.

### FINDINGS OF FACT

On July 7, 1988, the Division of Taxation issued to petitioner Amherst Cablevision, Inc. ("Amherst") a Statement of Audit Adjustment, bearing assessment number C880707461N, which indicated a corporation tax deficiency under Article 9 of the Tax Law of \$163,264.00, plus penalty and interest, for the year 1986.

On August 29, 1988, the Division issued to Amherst a Notice of Deficiency in respect of assessment number C880707461N which asserted \$163,264.00, plus penalty and interest, under Article 9 of the Tax Law for the year 1986.

On or about October 7, 1988, Amherst filed a petition with the Division of Tax Appeals contesting the August 29, 1988 Notice of Deficiency.

On November 18, 1988, the Division issued to Amherst a second Statement of Audit Adjustment for the year 1986. This statement bore assessment number C881118461N and indicated a corporation franchise tax deficiency under Article 9-A of the Tax Law of \$1,113,225.80, plus interest. The statement set forth the following explanation:

"Based on the decision reached In the Matter of the Petition of Capitol [sic] Cablevision Systems, Inc., it was determined that corporations engaged in cable television are taxable under Article 9A, not Article 9 of the New York State Tax Law. The above assessment is based on that decision."

On or about January 19, 1989, the Division filed its answer in response to the petition filed by Amherst on or about October 7, 1988. As a response to the petition filed in respect of an asserted Article 9 deficiency, the answer contained statements related only to the October 7, 1988 petition and the asserted Article 9 deficiency.

By correspondence dated February 1, 1989, the Division's Tax Compliance Division advised Amherst in respect of assessment number C880707461N as follows:

"AS A RESULT OF YOUR CORRESPONDENCE AND/OR RECENT CONFERENCE, THE BALANCE OF THE ABOVE ASSESSMENT HAS BEEN CANCELLED."

On September 27, 1989, the Division issued to Amherst a Notice of Deficiency which asserted \$1,113,225.80 in tax due, plus interest, under Article 9-A of the Tax Law for the year 1986. This notice bore assessment number C890927951N.

On December 29, 1989, the Division, by Linda Martinez, Tax Technician I, issued a letter to Amherst, the body of which is set forth, in pertinent part, below:

"This letter is intended to accomplish two purposes: (1) to formally assert an additional franchise tax deficiency for the year 1986 in supplement to Notice #C880707461N; (2) to clarify the Audit Division's position regarding the status of the administrative proceeding which was commenced by the petition of this notice.

Notice #C880707461N asserted a franchise tax deficiency under Article 9. Subsequent to the issuance of this notice, the Tax Tribunal held in the Matter of the Petition of Capitol [sic] Cablevision that cable television companies were subject to franchise tax under Article 9A, not Article 9. Based on this decision, the Division issued deficiency Notice #C890927951N which asserts franchise tax due under Article 9A. The intent in issuing this notice was merely to assert an additional franchise tax deficiency for 1986.

It appears that the proper procedure for asserting a greater deficiency is to issue a notice in supplement to the original franchise tax deficiency notice which was petitioned. Accordingly, the cancellation notice issued in regard to Notice #C880707461N should be deemed a nullity. It should be noted that your client did not sign off on this cancellation notice; therefore, the administrative proceeding pertaining to this notice was never concluded.

In summary, Notice #C890927951N need not be petitioned because it is, in effect, a de facto notice of claim asserting an additional deficiency. The original notice remains intact, and additional deficiency is asserted in an amount listed below."

The December 29, 1989 letter to Amherst indicated that the revised assessment number C880707461N now asserted \$1,113,225.80 in tax due, plus interest, under Article 9-A of the Tax Law for the year 1986.

On July 7, 1988, the Division issued to petitioner Ken-Ton Cablevision, Inc. ("Ken-Ton") a Statement of Audit Adjustment, bearing assessment number C880707460N, asserting a corporation tax deficiency under Article 9 of the Tax Law of \$131,040.00, plus penalty and

interest, for the year 1986.

On August 29, 1988, the Division issued to Ken-Ton a Notice of Deficiency in respect of assessment number C880707460N asserting \$131,040.00 in tax due under Article 9 of the Tax Law, plus penalty and interest, for the year 1986.

On or about October 7, 1988, Ken-Ton contested the August 29, 1988 Notice of Deficiency by filing a petition with the Division of Tax Appeals.

On November 18, 1988, the Division issued Ken-Ton a second Statement of Audit Adjustment in respect of the year 1986. This statement bore assessment number C881118463N and asserted a corporation tax deficiency under Article 9 of the Tax Law of \$937,139.57, plus interest, for the year 1986. The statement set forth the following explanation:

"Based on the decision reached In the Matter of the Petition of Capitol [sic] Cablevision Systems, Inc., it was determined that corporations engaged in cable television are taxable under Article 9A, not Article 9 of the Tax Law. The above assessment is based on this decision."

By correspondence dated February 1, 1989, the Division's Tax Compliance Division advised Ken-Ton in respect of assessment number C880707460N as follows:

"AS A RESULT OF YOUR CORRESPONDENCE AND/OR RECENT CONFERENCE, THE BALANCE OF THE ABOVE ASSESSMENT HAS BEEN CANCELLED."

On or about February 8, 1989, the Division filed its answer in response to the petition filed by Ken-Ton on or about October 7, 1988. As a response to the petition filed in respect of an asserted Article 9 deficiency, the answer contained statements related only to the October 7, 1988 petition and the asserted Article 9 deficiency.

On September 27, 1989, the Division issued to Ken-Ton a Notice of Deficiency asserting \$1,113,225.80 in tax due, plus interest, under Article 9-A of the Tax Law for the year 1986. This notice bore assessment number C890927951N.

On December 29, 1989, the Division, by Linda Martinez, Tax Technician I, issued the following letter to Ken-Ton:

"This letter is intended to accomplish two purposes: (1) to formally assert an additional franchise tax deficiency for the year 1986 in supplement to Notice #C880707460N; (2) to clarify the Audit Division's position regarding the status of

the administrative proceeding which was commenced by the petition of this notice.

Notice #C880707460N asserted a franchise tax deficiency under Article 9. Subsequent to the issuance of this notice, the Tax Tribunal held in the Matter of the Petition of Capitol [sic] Cablevision that cable television companies were subject to franchise tax under Article 9A, not Article 9. Based on this decision, the Division issued deficiency Notice #C890927950N which asserts franchise tax due under Article 9A. The intent in issuing this notice was merely to assert an additional franchise tax deficiency for 1986.

It appears that the proper procedure for asserting a greater deficiency is to issue a notice in supplement to the original franchise tax deficiency notice which was petitioned. Accordingly, the cancellation notice issued in regard to Notice #C880707460N should be deemed a nullity. It should be noted that your client did not sign off on this cancellation notice; therefore, the administrative proceeding pertaining to this notice was never concluded.

In summary, Notice #C890927950N need not be petitioned because it is, in effect, a de facto notice of claim asserting an additional deficiency. The original notice remains intact, and additional deficiency is asserted in an amount listed below."

The December 29, 1989 letter to Ken-Ton indicated that the revised assessment number C880707460N now asserted \$937,139.57 in tax due, plus interest, under Article 9-A of the Tax Law for the year 1986.

On July 7, 1988, the Division issued to petitioner Comax Telecom Corporation ("Comax") a Statement of Audit Adjustment, bearing assessment number C880707462N, which asserted a corporation tax deficiency under Article 9 of the Tax Law of \$346,557.00, plus penalty and interest, for the year 1986.

On August 29, 1988, the Division issued to Comax a Notice of Deficiency in respect of assessment number C880707462N asserting \$346,557.00 in tax due under Article 9 of the Tax Law, plus penalty and interest, for the year 1986.

On or about October 7, 1988, Comax contested the August 29, 1988 Notice of Deficiency by filing a petition with the Division of Tax Appeals.

On or about January 19, 1989, the Division filed its answer in response to the petition filed by Comax on or about October 7, 1988. As a response to the petition, the answer contained statements related only to the October 7, 1988 petition and the asserted Article 9 deficiency.

On December 29, 1989, the Division, by Linda Martinez, Tax Technician I, transmitted

the following letter to Comax:

"The notice of deficiency issued for additional tax, interest and penalties dated July 7, 1988, regarding your December 31, 1986 report has been revised based upon a recent New York State Tribunal decision. In the Matter of the Petition of Capitol [sic] Cablevision Systems, Inc., it was determined that corporations engaged in cable television are taxable under Article 9A of the Tax Law.

Therefore, Assessment Number C880707462N has been revised to reflect the tax under Article 9A."

The December 29, 1989 letter to Comax indicated that the revised assessment number C880707462N now asserted \$4,908,781.84 in tax due, plus interest, under Article 9-A of the Tax Law for the year 1986.

Petitioners Amherst and Ken-Ton were in no way prejudiced by the Division's issuance of the correspondence dated February 1, 1989 advising them of the cancellation of the assessments which were the subject of the August 29, 1988 notices of deficiency.

The September 27, 1989 notices of deficiency issued to petitioners Amherst and Ken-Ton were issued subsequent to the filing of petitions in respect of the same year and were therefore null and void pursuant to Tax Law § 1089(d)(4).

At the hearing held on September 12, 1990, the only issues discussed were the procedural matters outlined in paragraphs "27" through "29". The substantive merits of the Division's and petitioners' positions regarding the alleged corporation tax deficiencies were not part of the hearing as the respective parties and administrative law judge agreed to hold such matters in abeyance pending the resolution of the procedural issues.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioners assert that the three letters dated December 29, 1989 (see Findings of Fact "8", "17" and "23") are not legally sufficient to constitute claims asserting increased deficiencies under Article 9-A of the Tax Law. Petitioners assert that the only deficiencies properly before the Division of Tax Appeals at present are those asserted by the Division of Taxation under Article 9 of the Tax Law.<sup>1</sup> Petitioners further assert that the only way by which

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<sup>1</sup>It is noted that the Division has conceded that the Article 9 deficiencies are improper pursuant to Matter of Capital Cablevision Systems, Inc. (Tax Appeals Tribunal, June 9, 1988).

the Division of Taxation may bring the asserted Article 9-A deficiencies before the Division of Tax Appeals is to request permission to serve amended answers asserting the Article 9-A deficiencies. If the Division should make such a request, petitioners assert that they should have an opportunity to respond to such request and an opportunity to file a reply if so desired.

The Division contends that the December 29, 1989 letters do constitute adequate notice of the Division's claim of increased deficiencies, and that such increased deficiencies are properly at issue in the instant matter. The Division takes the position that petitioners should file amended petitions in response to the asserted claims of increased deficiencies if they so desire, and that the Division would then respond with amended answers.

Both sides agree that, pursuant to Tax Law § 1089(e)(3), the Division would have the burden of proof at hearing with respect to the increased deficiencies.

#### CONCLUSIONS OF LAW

A. Since it would appear that the Division of Taxation would have the burden of proof pursuant to Tax Law § 1089(e)(3) with respect to any tax

deficiencies asserted against petitioners under Article 9-A for the year 1986, it is appropriate that the Division file an affirmative pleading to give both the Division of Tax Appeals and petitioners notice of the facts to be proven by the Division in order to sustain its assertion of deficiencies under such article (see 20 NYCRR 3000.4[a][2]; see also, Rule 36[b] United States Tax Court Rules of Practice and Procedure).

Accordingly, the Division is directed to file, within 30 days from the issuance of this determination, amended answers in the matters at issue herein.

Additionally, under the circumstances herein, and in the interest of providing notice to the Division of Taxation and the Division of Tax Appeals of the basis of their positions, petitioners are directed to file replies in response to the Division's amended answers within 20 days after service of the amended answers.

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Upon the filing of the amended answers and replies, this matter shall be scheduled for hearing on the merits. No extensions of the filing periods shall be granted.<sup>2</sup>

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE

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<sup>2</sup>It should be noted that the issue of whether the December 29, 1989 letters, by themselves, constitute assertions of greater deficiencies under Tax Law § 1089(d)(1) is moot, since this determination directs the Division to file amended answers which shall serve to give petitioners notice of the Division's assertion of greater deficiencies and the facts to be proven to sustain such deficiencies. It should be further noted that petitioners' proposed method by which the Division may raise the Article 9-A deficiencies, i.e. by requesting permission to file an amended answer (see paragraph "27"), is rejected. No useful purpose would be served by resorting to such a method where it is clearly in the best interests of both the parties and the Division of Tax Appeals for the Division of Taxation to file amended pleadings.